THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Not reportable

CASE NO: 598/04

In the matter between :

MUSAWENKOSI MAKHATHINI Appellant

and

THE STATE Respondent

Before:	**STREICHER, PONNAN JJA & NKABINDE AJA**
Heard:	**1 SEPTEMBER 2005**
Delivered:	**19 SEPTEMBER 2005**
Summary:	**Rape – improbability of daughter falsely accusing father a factor that may be taken into account and used in cross-examining the accused.**

JUDGMENT

STREICHER JA

STREICHER JA:

[1] The appellant was convicted in the regional court at Empangeni on three counts of rape and sentenced to eight years imprisonment on each count which sentences of imprisonment were to run concurrently. An appeal to the High Court in Pietermaritzburg was unsuccessful but that court ('the court *a quo*') granted leave to the appellant to appeal to this court.

[2] The complainant is the appellant's daughter who was 17 years old at the time of the trial in February 1999. The appellant was during the period 1995 to 1998 living with her uncle and aunt, Mr and Mrs Mnqayi, while her mother, grandmother and grandfather lived nearby. She testified that in June 1997 she went to visit the appellant who lived elsewhere, in order to get some money from him. During the evening the appellant sent for her. When she and the appellant were alone in his hut he offered her a R100 note but when she was about to take it he did not give it to her but grabbed her, made her fall down and raped her. In September 1997 and in December 1997 the appellant again raped her. According to the complainant the appellant's *modus operandi* was the same on each occasion. Whenever she cried he put a cloth over her mouth to muffle the sound. On the first occasion and subsequently he threatened that she would die if she were to tell anybody what had happened. She did not

report the incidents to anybody until the following year after a discussion at school about parents who sexually abuse their children. On that occasion she started crying and subsequently, when asked by the teacher, a Ms Barnes, why she was crying, told her that she had several times been sexually abused by her father. Acting upon the advice of Ms Barnes the complainant afterwards also told her aunt, Mrs Mnqayi, what had happened. The appellant denied that he ever sexually abused the complainant.

[3] Subsequent to the December incident the complainant did not visit her father again. Apart from these incidents there were no problems between the two of them. The complainant had a good relationship with the appellant, his mother, his two wives, his brother and his sister, all of whom were staying with him. According to the appellant the complainant, prior to 1997, even wanted to stay with him but was prevented from doing so by her uncle who alleged that he had bewitched her mother thereby preventing her from remarrying. The appellant also sided with the complainant when she, against the wishes of her uncle, wanted to be sent to a boarding school.

[4] The regional magistrate found:

'In turning to the complainant, she made a good impression on the Court. She gave her evidence in a confident, forthright manner. As is apparent from the summary, there are contradictions in her evidence, but these shortcomings do not

detract from the general reliability of the complainant as a witness. Her evidence is corroborated in material respects by two other State witnesses, Ms Barnes and Mrs Mnqayi.'

[5] The court *a quo* correctly held that the presiding magistrate erred in admitting the evidence of the report to Mrs Mnqayi on the basis of it being a first report and in finding corroboration of the complainant's evidence in the evidence of Ms Barnes. As stated by the court *a quo* proof of a complaint in a sexual case is adduced to establish consistency, not corroboration (see *S v Hammond* 2004 (2) SACR 303 (SCA) paras 12 – 16). The court *a quo* was nevertheless satisfied that the complainant's evidence could be relied upon.

[6] The magistrate rejected the evidence of the appellant and said in this regard:

'He was a totally unsatisfactory witness. He did not impress the court at all. He too was unsettled in the witness stand.[1] He was evasive in the extreme and did not give his evidence in a coherent manner. The accused was defiant at times and the Court had to caution him to answer questions put to him, and not to answer questions with questions. Many of these questions remain unanswered. He rambled on in attempts to try to explain himself, tailoring his evidence as he went along in an attempt to explain the events which led to his arrest. In the process he was totally unconvincing. His version was riddled with improbabilities.'

And:

[1] The other witness referred to as having been unsettled is another daughter of the appellant who was called by the defence.

'One must not forget that when the complainant testified in this matter she was no longer residing with the said uncle. He had booted her out in view of the fact that she had fallen pregnant.[2] It is highly unlikely, that if the accused's version is true, that the complainant would have remained loyal to her uncle and in the process lose the love and support of her father.'

[7] Before us the appellant's counsel made the following four submissions as to why the appeal should succeed:

a) The magistrate's finding that the complainant made a good impression and that she was in general a reliable witness was influenced by what she considered to be corroboration.

b) The magistrate based his finding as to the reliability of the complainant referred to above exclusively on the demeanor of the complainant and 'demeanor, in itself is a fallible guide to credibility.'

c) The complainant's version, more particularly her evidence that the appellant used the same *modus operandi* on each occasion is improbable.

d) The appellant's unsatisfactory evidence was a result of him having been bombarded with questions as to why his own child would falsely implicate him and having been told by the prosecutor that he had to give an explanation for her having done so. There was no duty on the appellant to explain why he was charged or why his

[2] The complainant had in the meantime become pregnant by a boyfriend.

daughter would falsely implicate him. 'It was accordingly incorrect for the Magistrate to allow this questioning to go on unabated and to base her finding of credibility on the answers so elicited'.

[8] The first two submissions can be disposed of summarily. The magistrate found the complainant a reliable witness quite apart from the fact that she considered her evidence to have been corroborated by the evidence of Ms Barnes and Mrs Mnqayi and it is quite clear that she did not base her finding only on the demeanor of the complainant.

[9] The submission that the complainant's version was improbable was rejected by the court *a quo*. It referred to the fact that the complainant visited her father because she needed financial assistance from him and added: 'It must also be borne in mind that the Complainant felt a strong sense of filial duty towards her father. This is clear from the respectful manner in which she referred to him and the duteous way in which she behaved when she visited him. This is not unusual in cases such as these where the abused person is not only dependent upon her abuser but also fears him, feels ashamed and does not wish to reveal the abuse (*S v B* 1996 (2) SACR 543 (C)).'

[10] I agree with the court *a quo* that for the reasons given by it, it cannot be found that the complainant's version is improbable. Further support for this finding is to be found in the fact that it is on the evidence highly improbable that the complainant would falsely have accused her

father with whom she had a good relationship and who supported her, of having raped her.

[11] In support of his argument that the magistrate should not have allowed the questioning as to why the appellant would falsely accuse the appellant of having raped her, to go on unabated the appellant's counsel relied on the following statement by Millin J in *Schulles v Pretoria City Council* (unreported) referred to by Dowling J in *R v Mtembu* 1956 (4) SA 334 (T) at 336A-B:

> 'It is a wrong approach in a criminal case to say 'Why should a witness for the prosecution come here to commit perjury?' It might equally be asked: "Why does the accused come here to commit perjury?" True, an accused is interested in not being convicted, but it may be that an inspector has an interest in securing a conviction. It is, therefore, quite a wrong approach to say "I ask myself whether this man has come here to commit perjury, and I can see no reason why he should have done that; therefore his evidence must be true and the accused must be convicted." The question is whether the accused's evidence raises a doubt.'

[12] Whatever the merit of that statement may be in the particular circumstances of that case, it can as a matter of logic not apply in the circumstances of this case where on the evidence it is improbable that the complainant would falsely have accused the appellant of having raped her. The appellant had to be given an opportunity to deal with the improbability and cannot complain about having been prompted to do so.

The prosecutor was quite entitled to use the improbability in cross-examining the appellant.

[13] In my view appellant's counsel did not advance any reason why this court should interfere with the conviction of the appellant and there does not appear to be any.

[14] The appeal is therefore dismissed.

STREICHER JA

PONNAN JA)

NKABINDE AJA) CONCUR